

## REMARKS

Favorable reconsideration of this application, as amended, and in light of the following discussion is respectfully requested. Claims 1-2, 4-6, 8-10, 13-14, 16-17, 19-21, 23-24, 26-29, 31-37, 39-40, 42-90, and 92-102 are pending. Claims 3, 7, 11-12, 15, 18, 22, 25, 30, 38, 41, and 91 have been cancelled. Claims 92-102 have been added. Support for claims 92-102 can be found in the specification at, for example, paragraph [0038].

Independent claims 1, 5, and 9 are directed to a frozen dispenser beverage and a method of making the same where the freezing point depressant is erythritol.

Claim 13 has been amended to include all of the limitations of claim 15. Thus, as indicated by the Examiner in the prior office action, claim 13 (previously allowed claim 15) and its dependents are in condition for allowance.

Claim 21 has been amended to include all of the limitations of claim 22. Thus, as indicated by the Examiner in the prior office action, claim 21 (previously allowed claim 22) and its dependents are in condition for allowance.

Claim 29 has been amended to include all of the limitations of claim 30. Thus, as indicated by the Examiner in the prior office action, claim 29 (previously allowed claim 30) and its dependents are in condition for allowance.

Claim 37 has been amended to include all of the limitations of claim 38. Thus, as indicated by the Examiner in the prior office action, claim 37 (previously allowed claim 38) and its dependents are in condition for allowance.

In summary, with the amendments to claims 13, 21, 29, and 37, all of the following claims have placed into independent form or depend from an allowed claim

FINNEGAN  
HENDERSON  
FARABOW  
GARRETT &  
DUNNER LLP

1300 I Street, NW  
Washington, DC 20005  
202.408.4000  
Fax 202.408.4400  
www.finnegan.com

placed in independent form and, thus, are in condition for allowance: 13-14, 16-17, 19-21, 23-24, 26-29, 31-37, 39-43, 55-90, and 97-102.

**Rejections based upon U.S. Patent 6,468,576 to Sher et al.**

Claims 1, 9, 21, 29, 37, 44, 64, 73, and 82 have been rejected under 35 U.S.C. § 102(b) as allegedly anticipated by U.S. Patent No. 6,468,576 to Sher et al. This rejection is respectfully traversed.

First, Sher et al. was granted on October 22, 2002, which is after the April 20, 2001, filing date of the instant application. This reference was not published or patented more than one year before the filing of the instant application. Therefore, the appropriate section of 35 U.S.C. §102 under which this reference may be applied is section 102(e), as of its effective U.S. filing date.

Since applicants have placed claims 21, 29, 37, 64, 73, and 82 into condition for allowance, this rejection only continues to apply as to claims 1, 9, and 44. As amended, claims 1 and 9 are directed to substantially reduced calorie and non-caloric frozen dispenser beverages which use erythritol as a freezing point depressant. Such a frozen dispenser product containing erythritol is neither taught nor suggested by Sher et al.

Claim 44 requires the presence of a high potency non-caloric sweetener. A dispenser beverage containing such a sweetener is neither taught nor suggested by Sher et al. Since Sher et al. fails to teach or suggest all of the limitations of the invention as claimed, withdrawal of this rejection is respectfully requested.

FINNEGAN  
HENDERSON  
FARABOW  
GARRETT &  
DUNNER LLP

1300 I Street, NW  
Washington, DC 20005  
202.408.4000  
Fax 202.408.4400  
www.finnegan.com

Claims 45, 65, 66, 74, and 84 stand rejected under 35 U.S.C. §103(a) as obvious over Sher et al. Since claims 65-66, 74, and 84 have been placed into condition for allowance, this rejection has been mooted as to those claims. For the same reasons as stated above regarding claim 44, from which claim 45 depends, Sher et al. neither teaches nor suggests the invention as presently claimed. In the beverage syrup of Sher et al., the product will not have a substantial reduction in calories since corn syrup is used in all formulations. Further, nowhere does Sher et al. suggest that a high potency non-caloric sweetener may be included. To substitute the corn syrup of Sher et al. with a high potency non-caloric sweetener would not be obvious to the skilled artisan since the carbohydrate/sugar component of corn syrup acts to stabilize that composition, which is the articulated goal of Sher et al. Since Sher et al. fails to teach or suggest the invention as claimed, withdrawal of this rejection is respectfully requested.

Claims 29, 32, 34, and 35 have been rejected under 35 U.S.C. §103(a) as obvious over Sher et al., further in view of Marulich and deTroostembergh et al. In view of the amendments are discussed above, these claims have been placed into condition for allowance and this rejection has been rendered moot. Withdrawal of this rejection is respectfully requested.

#### **Rejections based upon Baccus**

Claims 1, 4-6, 9, 13-14, 20-21, 29, 37, 44-47, 49, 51, 55, 57, 58, 60, 62, 64, 67, 69, 73, 76, 82, and 85 have been rejected under 35 U.S.C. § 103(a) as unpatentable over Baccus, either U.S. Patent No. 4,986,994 or 5,069,924, taken in view of Marulich. The Examiner alleges that Baccus teaches a low calorie slush beverage. This rejection is respectfully traversed.

FINNEGAN  
HENDERSON  
FARABOW  
GARRETT &  
DUNNER LLP

1300 I Street, NW  
Washington, DC 20005  
202.408.4000  
Fax 202.408.4400  
www.finnegan.com

First, since claims 13-14, 20-21, 29, 37, 55, 57, 58, 60, 62, 64, 67, 69, 73, 76, 82, and 85 have been placed into condition for allowance thereby rendering this rejection moot, the discussion will include only claims 1, 4-6, 9, 44-47, 49, and 51.

As amended, the claims 1, 4-6, 44-47, 49, and 51 are directed to frozen dispenser beverages and methods of making the same. Claims 1 and 4-6 require erythritol as a freezing point depressant.

Baccus discloses a frozen dispenser beverage, but not a beverage which is non-caloric or of substantially reduced calorie. Baccus does not teach or suggest to the skilled artisan that it is possible to obtain an acceptable frozen dispenser beverage using a freezing point depressant other than sugar, since Baccus uses a natural sweetener in its beverage in an amount of from 27% to 47%. The natural sweetener is made up of 71% fructose (see column 3, lines 50 to 55). Until the present invention, the art has not recognized the ability to make a reduced calorie frozen dispenser beverage because artificial sweeteners have heretofore not sufficiently reduced the freezing point of the beverage syrup to prevent it from freezing into a single solid mass in the dispensing machine. Like Baccus, prior art frozen dispenser beverages have contained sufficiently high carbohydrate sugars to provide a dispensable product.

Marulich does not remedy the deficiencies of Baccus. Marulich is not directed to a dispenser beverage, but is instead concerned with a "home freezer" product that will have characteristics "as good as a dispenser beverage." Further, like Baccus, Marulich is directed to a sweetened product, not a substantially reduced calorie or non-caloric beverage. Thus, Marulich neither teaches nor suggests removal of the sweetener from Baccus.

Finally, regarding claims 1 and 4-6, neither Baccus nor Marulich teach or suggest the use of erythritol as a freezing point depressant. Since Baccus, alone or taken with Marulich, does not establish a prima facie case of obviousness, withdrawal of this rejection is respectfully requested.

Claims 1, 2, 4-6, 9, 10, 12-14, 16-17, 20-21, 24, 25, 28-29, 32, 37, 40-47, 49, 51, 55-58, 62, 64-67, 71, 82-83, 85, and 87 have been rejected under 35 U.S.C. § 103(a) as unpatentable over Baccus, either U.S. Patent No. 4,986,994 or 5,069,924, taken in view of Sakai.

Since claims 13-14, 16-17, 20-21, 24, 28-29, 32, 37, 40-43, 55-58, 62, 64-67, 71, 82-83, 85, and 87 have been placed into condition for allowance and claims 12, 25, and 41 have been cancelled, this rejection has only been addressed as to claims 1, 2, 4-6, 9-10, 44-47, 49, and 51.

As discussed above, Baccus does not teach the invention as presently claimed. Sakai does not remedy the deficiencies of Baccus. Sakai is directed to a sweetener which is made up of sorbitol, maltitol, dextrin, and aspartame. First, regarding claims 1, 2, 4-6, and 9-10, Sakai does not teach or suggest the use of erythritol. Further, nothing within either Baccus or Sakai teaches or suggests that the skilled artisan should substitute the sweetener of Baccus with the sweetener of Sakai or that a frozen dispensable beverage would result. In fact, based upon the state of the art prior to the present invention, the skilled artisan would not have expected to be able to use the sweetener of Sakai in a frozen dispenser beverage since, as discussed above, high potency low calorie sweeteners were known to provide insufficient freezing point depression.

Since Baccus alone or taken in combination with Sakai neither teaches nor suggests the invention as presently claimed, withdrawal of this rejection is respectfully requested.

Claims 3, 7, 8, 11, 19, and 35 have been rejected as unpatentable over Baccus, either U.S. Patent No. 4,986,994 or 5,069,924, taken in view of Marulich and in view of Sakai and further in view of de Troostembergh et al. Claims 3, 7, and 11 have been cancelled. Claims 19 and 35 have been placed in condition for allowance rendering this rejection moot. Regarding claim 8, none of the deficiencies of Baccus has been remedied by de Troostembergh et al. While de Troostembergh et al. teaches the use of erythritol, de Troostembergh et al. is directed to a composition that substitutes some of the cariogenic sweetener with erythritol. de Troostembergh et al. recognizes that the addition of erythritol to a food or drink product can render the cariogenic sweetener non-cariogenic. de Troostembergh et al., at best, suggests partial replacement of a sweetener with erythritol in compositions such as chewing gum and milk chocolate. de Troostembergh et al. nowhere suggests that a sweetener may be replaced with erythritol in a frozen dispenser beverage or that an acceptable dispensable product would result. Since all of Baccus, Sakai, Marulich and deTroostembergh et al. include full calorie sweeteners in their products and since deTroostembergh et al. does not remedy the deficiencies of Baccus, alone or in view of one or both of Marulich or Sakai, the claims, as amended, are not rendered obvious.

#### **Rejections based on Marulich**

Claims 1, 5, 9, and 44-46 are rejected under 35 U.S.C. §102(b) as being clearly anticipated by Marulich.

FINNEGAN  
HENDERSON  
FARABOW  
GARRETT &  
DUNNER LLP

1300 I Street, NW  
Washington, DC 20005  
202.408.4000  
Fax 202.408.4400  
www.finnegan.com

Marulich does not teach or suggest a non-caloric frozen dispenser beverage containing an erythritol as a freezing point depressant. Marulich is not directed to a dispenser beverage at all, but is instead concerned with a "home freezer" product that will have characteristics "as good as a dispenser beverage." Further, Marulich is concerned with making a sweetened product, not a substantially reduced calorie or non-caloric beverage. Thus, Marulich neither teaches or suggests the use of erythritol. Therefore, it would not be obvious to the skilled artisan based on Marulich to use erythritol as a freezing point depressant to produce an acceptable dispenser beverage. Withdrawal of this rejection is respectfully requested.

Claims 1, 2, 4-6, 9-10, 12-14, 16-17, 20, 29, 32, 34, 36-37, 40-63, and 73-91, are rejected under 35 U.S.C. §103(a) over Marulich in view of Beyts. Since claims 13-14, 16-17, 20, 29, 32, 34, 36-37, 40, 42-43, 55-63, and 73-90 have been placed into condition for allowance and claims 12, 41, and 91 have been cancelled, this rejection will only be addressed regarding claims 1, 2, 4-6, 9-10, and 44-55.

For the reasons discussed above, Marulich neither teaches nor suggests the claimed frozen dispenser beverage. Beyts does not remedy the deficiencies of Marulich. Beyts et al. is not directed to the production of a frozen dispenser beverage. Beyts et al. discloses a synergist sweetener for use in food products. Nothing within either Marulich or Beyts et al. would suggest to the skilled artisan that an appropriate reduced calorie or non-caloric freezing point depressant could be used to create a dispensable frozen beverage. Since neither Marulich nor Beyts et al., taken alone or in combination, teach or suggest the claimed substantially reduced calorie or non-caloric frozen dispenser beverage, withdrawal of this rejection is respectfully requested.

Claims 21, 64, 67, and 68 have been rejected under 35 U.S.C. § 103(a) as unpatentable over Marulich in view of Beyts and further in view of Sher et al.. Claims 21, 64, 67, and 68 have been placed into condition for allowance rendering this rejection moot. Withdrawal of this rejection is respectfully requested.

**Rejections based upon Stefandl**

Claims 5, 12, 21, 25, 37, 40-43, 64, 65, 67, 69, 71, 82-85, and 87 have been rejected under 35 U.S.C. § 102(b) as being anticipated by Stefandl. This rejection is respectfully traversed.

First claims 21, 25, 37, 40-43, 64-65, 67, 69, 71, 82-85, and 87 have been placed into condition for allowance. Based upon the amendments to these claims presented herein, this rejection has been rendered moot. Claim 12 has been cancelled. Regarding claim 5, this claim is directed to a method of making a non-caloric frozen dispenser beverage using the freezing point depressant erythritol. Stefandl is not concerned with the production of a frozen dispenser slush-type beverage. Stefandl is directed to the production of freezer-ready products that when frozen can be rapidly defrosted for consumption without any loss of flavor. Stefandl relies upon glucose and other carbohydrates to achieve a sufficient reduction in the freezing point to prepare an acceptable product. As set forth in claim 5, the frozen dispenser beverage is non-caloric. Since Stefandl neither teaches nor suggests the production of a non-caloric frozen dispenser beverage, withdrawal of this rejection is respectfully requested.

FINNEGAN  
HENDERSON  
FARABOW  
GARRETT &  
DUNNER LLP

1300 I Street, NW  
Washington, DC 20005  
202.408.4000  
Fax 202.408.4400  
www.finnegan.com



**Conclusion**

In view of the foregoing amendments and remarks, Applicants respectfully request the reconsideration and the continued examination of this application and the timely allowance of the pending claims.

Please grant any extensions of time required to enter this response and charge any additional required fees to our deposit account 06-0916.

Respectfully submitted,

FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, L.L.P.



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(September 20, 2003 being a  
Saturday)

By: Reg No 44033  
Lori-Ann Johnson  
Reg. No. 34,498

FINNEGAN  
HENDERSON  
FARABOW  
GARRETT &  
DUNNER LLP

1300 I Street, NW  
Washington, DC 20005  
202.408.4000  
Fax 202.408.4400  
www.finnegan.com